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Mr. Jeff S. Jordan, Assistant General Counsel
Attn: Donna Rawls, Paralegal
Office of Complaints Examination and Legal Administration
Federal Election Commission
999 E Street, NW
Washington, D.C. 20463

Re: Matter Under Review 7105

Dear Mr. Jordan:

On July 20, 2016, the Federal Election Commission ("FEC" or "Commission") notified our client, the American Action Network ("AAN"), of a complaint filed by the American Democracy Legal Fund ("ADLF") against AAN in the above-captioned matter. Our client Caleb Crosby subsequently received notice on August 22, 2016, that he, too, is a respondent in this matter in his personal capacity.¹

The complaint's singular allegation is that a 24-hour independent expenditure report signed by Mr. Crosby and filed by AAN on June 4, 2016, "provided false information" in violation of 52 U.S.C. § 30104(c)(2)(a). Compl. at 2. This statutory provision requires that an independent expenditure report include information "indicating whether the independent expenditure is in support of, or in opposition to, the candidate involved." 52 U.S.C. § 30104(c)(2)(a). ADLF claims that AAN made an independent expenditure in support of congressional candidate Helene Schneider and then falsely reported that the expenditure was made to oppose Schneider. Compl. at 2-3. However, ADLF's complaint rests on a factually inaccurate statement in a single, unsworn newspaper article. As this submission demonstrates, AAN accurately reported that its independent expenditure was made to oppose Schneider. Accordingly, the Commission should find no reason to believe that AAN violated the Federal Election Campaign Act of 1971, as amended ("FECA" or "Act"), and close the file in this matter.

Furthermore, the FEC cannot proceed against Mr. Crosby in his personal capacity for signing AAN's 24-hour independent expenditure report as AAN's agent. Personal liability under these circumstances has no basis in the FECA or

¹ By letter from the FEC dated August 29, 2016, AAN and Mr. Crosby received an extension of the deadline to file a response until October 9, 2016. Because October 9th fell on a Sunday, and because the following day was a federal holiday, this response was filed on October 11, the next business day following the deadline.

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FEC regulations and is squarely at odds with well-settled agency law. The Commission should clarify that an individual such as Mr. Crosby cannot be personally liable under FECA for signing an independent expenditure report on behalf of a principal.

FACTUAL BACKGROUND

AAN is an independent nonprofit organization recognized as tax-exempt under section 501(c)(4) of the Internal Revenue Code and not affiliated with or controlled by any candidate, political party, or officeholder. AAN, *About* (last visited Oct. 5, 2016), <https://americanactionnetwork.org/about>. AAN works to “create, encourage and promote center-right policies based on the principles of freedom, limited government, American exceptionalism, and strong national security.” AAN, *About*. Its “goal is to put [its] center-right ideas into action by engaging . . . the American people and spurring them into active participation in our democracy.” AAN, *About*.

On June 4, 2016, AAN filed a 24-hour independent expenditure report disclosing that it made a \$25,000 independent expenditure for phone calls to oppose Helene Schneider, who was a candidate in the June 7, 2016 Democratic primary election for California’s 24th Congressional District. This report was electronically signed by AAN’s agent, Caleb Crosby.

The script for the phone calls, prepared by AAN’s vendor Revolvus Consulting and attached as Exhibit A, clearly states that the calls were made to oppose Schneider’s candidacy. The phone calls identified Schneider as a “Bernie Sanders-type liberal” and stated that she was “way too liberal for our community.” The calls further described Schneider’s positions as supporting more gun control, regulation of big banks, and redistribution of wealth, and closed by asking the listener to “vote against Helene Schneider.” See Exhibit A.

A local news article subsequently reported that one individual who received AAN’s call claimed the caller asked her to vote for Schneider; the article stated that “[o]ther registered Democrats received the same calls.”² Based solely on this individual’s uncorroborated characterization of the phone calls, ADLF filed the complaint in this matter, alleging that AAN and Mr. Crosby reported false

² Kelsey Brugger, *Dem Voter Registration Jumps*, The Santa Barbara Independent, June 6, 2016, available at <http://www.independent.com/news/2016/jun/06/primary-election-eve/>.

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information to the FEC—in violation of 52 U.S.C. § 30104(c)(2)(a)—when AAN reported that its independent expenditure opposed Schneider.

THE LAW

Any person who makes independent expenditures of \$1,000 or more to advocate the election or defeat of a clearly identified candidate, after the 20th day—but more than 24 hours—before an election, must file a report with the FEC within 24 hours. 52 U.S.C. § 30104(g)(1)(A); 11 C.F.R. § 109.10(d). Among other requirements, the report must indicate whether the independent expenditure supported or opposed the clearly identified candidate. 52 U.S.C. § 30104(c)(2)(A); 11 C.F.R. § 109.10(e)(IV).

In addition, the report must be certified, under penalty of perjury, by “the person who made the independent expenditure.” 11 C.F.R. § 109.10(e)(2)(ii); 52 U.S.C. § 30104(c)(2)(A).

DISCUSSION

I. AAN accurately reported its independent expenditure, and ADLF lacks any factual basis to claim that a FECA violation occurred.

ADLF’s complaint against AAN should be dismissed for two reasons. First, ADLF’s claim that AAN’s independent expenditure was made to support Helene Schneider’s candidacy is demonstrably false. The plain language of the phone calls’ script makes clear that they opposed Schneider. Thus, AAN’s 24-hour independent expenditure report was accurate. Second, ADLF’s reliance on a single, uncorroborated characterization of the phone calls in question, as reported in one newspaper article, cannot be the basis for finding reason to believe a violation of the Act occurred.

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A. The script of AAN's phone calls plainly demonstrates that they opposed Helene Schneider's candidacy.

The complaint states that AAN provided false information to the FEC on its June 4, 2016 24-hour independent expenditure report, in which AAN reported that its calls were made to oppose congressional candidate Helene Schneider. ADLF believes otherwise, that AAN's calls were made to *support* Schneider. This claim is patently wrong.

The script for the calls is clear that they opposed Schneider. In the calls, the caller described Schneider as "way too liberal for our community," identified Schneider's liberal positions on gun control, big banks, and redistribution of wealth, and closed by urging the recipient to "vote against Helene Schneider." *See Exhibit A.* Simply put, there is no way to construe the content of these phone calls as supportive of Schneider's candidacy. The plain language attacks Schneider's positions as "too liberal for [the] community" and urges the recipient to vote against Schneider. Thus, the complaint's claim that AAN's expenditure was made in support of Schneider is demonstrably false and should be dismissed.

B. The Complaint's dependence on a single, uncorroborated account in a newspaper article does not provide a basis for finding reason to believe a violation occurred.

In order for the Commission to find reason to believe a violation of the Act occurred, "the complainant, under penalty of perjury, must provide specific facts from reliable sources that a respondent fails to adequately refute." MUR 6056, Statement of Reasons of Commissioners Matthew S. Petersen, Caroline C. Hunter, and Donald F. McGahn (June 2, 2009). In this case, the specific facts in the complaint consist of a single, unsworn account by one individual, as reported in a newspaper article. Three Commissioners recently noted that "journalists often write quickly and their observations may be factually incorrect." MUR 6518, Statement of Reasons of Commissioners Matthew S. Petersen, Caroline C. Hunter, and Lee E. Goodman (June 2, 2016). It follows that the observations of their interview subjects may also be incorrect, particularly where, as here, such observations are entirely uncorroborated. Consequently, complaints based on such accounts "provide questionable legal and factual bases upon which to substantiate a reason to believe finding." *Id.*

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Because ADLF's complaint rests entirely upon a single, unsworn newspaper account of one person who allegedly received AAN's calls, the complaint hardly provides the "specific facts from reliable sources" required for a reason-to-believe finding. Accordingly, this matter should be dismissed.

II. Caleb Crosby cannot be liable for a violation of FECA by signing the 24-hour independent expenditure report on behalf of AAN.

ADLF also seeks to hold Mr. Crosby personally liable under FECA for signing AAN's 24-hour independent expenditure report containing the allegedly false information. This theory of liability has no basis in the FECA. Moreover, it defies basic principles of agency law and raises the prospect of serious due process concerns.

There is nothing in the FECA, FEC regulations, or elsewhere that imposes personal liability on an agent who signs a 24-hour independent expenditure report on behalf of a principal. Where the FECA does impose personal liability—namely, on the treasurer of a political committee responsible for filing the political committee's reports—it does so clearly and unambiguously. *See* 52 U.S.C. § 30104(a). The Commission is equally explicit in the regulations implementing this requirement, *see* 11 C.F.R. § 104.14(d) (“[e]ach treasurer of a political committee . . . shall be personally responsible for the timely and complete filing of the report or statement and for the accuracy of any information or statement contained in it”), and in its guidance for such persons, *see, e.g.,* FEC, *Nonconnected Committees* 4 (May 2008) (“A committee’s treasurer is personally responsible for carrying out [reporting] duties . . . and should understand these responsibilities (as well as his or her personal liability for fulfilling them) before taking them on.”). But AAN is not a political committee registered with the Commission, and, therefore, neither its treasurer nor any other individual can be held personally liable under the FECA for the acts of AAN.

In fact, nowhere in the statute, the regulations, and the Commission's guidance is there a mention of personal liability for an agent who signs an independent expenditure report on behalf of a principal such as AAN. The only possible legal authority for claiming that Mr. Crosby could be personally liable under the FECA is the language that appears beneath the signature line of the Form 5 used to file 24-hour independent expenditure reports that reads, “Note: Submission of false, erroneous, or incomplete information may subject the person

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signing this report to the penalties of 2 U.S.C. § 437g.” That code section, since relocated to 52 U.S.C. § 30109, prescribes the FEC’s general enforcement power under the FECA, which does not—as just explained—impose personal liability on an individual who signs a 24-hour independent expenditure report on behalf of a principal.

Furthermore, interpreting that one sentence of the Form 5 to impose personal liability on the signor would contradict other Commission guidance regarding the Form 5. First, we are aware of no statement by the Commission—in its regulations, explanations and justifications for those regulations, or in other guidance—where the Commission has so much as hinted that personal liability would attach to an agent who signs Form 5 on behalf of a principal. The Commission introduced Form 5 in 1976 as a new form “to be used by individuals and/or delegate-candidates in reporting contributions . . . and independent expenditures.” 41 Fed. Reg. 9229 (Mar. 3, 1976). Since then, Form 5 has been modified a number of times to reflect changes to the law and regulations. *See, e.g.*, 60 Fed. Reg. 35303 (July 6, 1995) (Form 5 to be modified for use by nonprofit corporations reporting independent expenditures); 67 Fed. Reg. 12838-39 (Mar. 20, 2002) (Form 5 to be amended to eliminate notarization requirement). Wholly absent is any indication that the Commission contemplated personal liability for an agent who signed Form 5 on behalf of a principal.

Second, FEC regulations are clear that the signatory of Form 5 is “the person who made the expenditure.” 11 CFR § 109.10(e)(2); *see also* FEC, *Instructions for Preparing FEC Form 5*, at 2 (directing that “Form 5 must be signed by the person making the independent expenditure”). Of course, it follows that where an individual *personally* makes an independent expenditure that requires filing a report using Form 5, the signor is identical to the person making the expenditure. Accordingly, that individual would be personally liable for the contents of the report. But that is not the case here.

In this case, the person making the expenditure was AAN, and thus when Mr. Crosby signed the report, he did so on AAN’s behalf. Under the well-settled principles of agency law, an agent who signs an instrument on behalf of his corporate principal does not bind himself personally. *See, e.g., Bonnant v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 467 F. App’x 4, 7 (2d Cir. 2012) (“A corporate officer who signs on behalf of the corporation is not liable unless he signs as an individual (in addition to signing as the corporate representative).”) (emphasis

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in original); *see also* Restatement (Second) of Agency § 320 (1958) (“Unless otherwise agreed, a person making or purporting to make a contract with another as agent for a disclosed principal does not become a party to the contract.”). As discussed above, the FECA contains no statutory authority for the Commission to deviate from these rules of agency law in the present case.

Moreover, for the Commission to depart from these well-settled principles without any notice to individuals such as Mr. Crosby would present serious due process concerns. “A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required.” *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012). Here, Mr. Crosby could have examined every word of the statute, regulations, and Commission guidance without finding any hint that the law would displace the fundamental rules of agency and impose personal liability on him for signing Form 5 on behalf of AAN. In light of these due process considerations, the FECA and its corresponding regulations cannot be read to assign personal liability to an agent who signs an independent expenditure report on behalf of a principal.

Accordingly, the Commission should clarify that an individual such as Mr. Crosby, who signs an independent expenditure report on behalf of a principal, is not personally liable for the contents of the report.

CONCLUSION

As demonstrated by the script of the phone calls, AAN’s 24-hour report accurately disclosed its independent expenditure made to oppose congressional candidate Schneider. The allegation that this expenditure was actually made to support Schneider lacks any basis in fact. Accordingly, the Commission should find no reason to believe that AAN and Mr. Crosby violated the FECA and close the file in this matter. Further, the Commission should clarify that Mr. Crosby—and others similarly situated—can have no personal liability under the FECA when signing an independent expenditure report on behalf of a principal.

Exhibit A

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CA-24 Live Script

Target: Democrats & Independents

Hi, is [target] home?

Hi [target] this is [name] and I'm calling about Democrat Congressional candidate Helene Schneider.

Helene Schneider is a Bernie Sanders-type liberal. Way too liberal for our community.

Both Helene Schneider and Sanders support more gun control.

Both Helene Schneider and Sanders will fight to regulate big banks.

Both Helen Schneider and Sanders will try to redistribute wealth.

Helen Schneider and Sanders are too liberal for our community. We deserve a more conservative representative in Congress.

Can we count on you to vote against Helen Schneider?

**Thanks for your time! This call was paid for by the American Action Network.
Not authorized by any candidate or candidate's committee.
americanactionnetwork.org.**